Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

No: 86-1920

McDONALD PONTIAC-CADILLAC-GMC, INC.
A Michigan Corporation,

Petitioner

v

PROSECUTING ATTORNEY
FOR THE COUNTY OF SAGINAW

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OF RECORD:

CHRISTOPHER S. BOYD
PROSECUTING ATTORNEY

ANNETTE M. GRAY
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Chief of Appeals
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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Respondent accepts Petitioner's delineation of the questions presented, but notes that Petitioner's Questions 4 and 5 were not previously raised or addressed by the Michigan courts below.

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MISCELLANEOUS:

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Respondent, the Saginaw County, Michigan Prosecuting Attorney, respectfully requests that this Honorable Court deny this Petition for Writ of Certiorari, which seeks review of the Michigan Court of Appeals' March 18, 1986 Opinion affirming the constitutionality of MCLA 435.251 et seq;MSA 9.2701 et seq, (McDONALD V SAGINAW PROSECUTOR, 150 Mich App 52; 388 NW 2d 301 (1986)), the Michigan Supreme Court's October 22, 1986 denial of leave to appeal said Opinion (McDONALD V SAGINAW PROSECUTOR, 426 Mich 866 (1986)), and the Michigan Supreme Court's April 1, 1987 denial of motion for reconsideration of denial of leave (unreported).

OPINION BELOW

Respondent accepts Petitioner's recitation of the Opinions Below as correct.

JURISDICTION

Respondent accepts Petitioner's recitation of jurisdictional provisions as correct, but makes procedural and jurisdictional bar arguments in the argument portion of this Brief.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Respondent accepts Petitioner's recitation of the Michigan Statute involved with the addition of Michigan Court Rule 7.313(D)(1), which provides as follows:

> Rule 7.313 MOTIONS IN SUPREME COURT
>
> * * *
>
> (D) Motion for Rehearing.
>
> (1) To move for rehearing, a party must file within 21 days after the opinion was filed (the date of an opinion is stamped on the upper right corner of the first page):
>
> (a) 24 printed copies of a motion, if the opinion decided a case placed on a session calendar; or
>
> (b) 14 typewritten copies of a motion, if the opinion decided a noncalendar case; and
>
> (c) proof that a copy was served on the parties.
>
> The motion for rehearing must include reasons why the court should modify its opinion.

COUNTERSTATEMENT OF THE CASE

Petitioner never argued infringement of the right to contract and violation of the Commerce Clause in its pleadings below. Accordingly, Michigan's Tenth Judicial Circuit Court, Michigan's Court of Appeals, and Michigan's Supreme Court were not presented with and did not decide those issues.

The Michigan Court of Appeals' Opinion cites no United States Constitutional Provision or United States Supreme Court precedent.

Petitioner's Motion for Reconsideration in the Michigan Supreme Court was not timely filed within 21 days of the Michigan Supreme Court's October 22, 1986 denial of leave to appeal. MCR 7.313(D)(1). That Motion for Reconsideration should have been filed no

later than November 12, 1986 in order to be timely. However, it was not filed until November 14, 1986, a fact of which this Honorable Court may take judicial notice. FRE 201(2).

Petitioner's Statement of the Case mislabels (i.e. reverses) Petitioner's Appendices F and G. The correct labeling is that Appendix F is Michigan Attorney General's Opinion 4958, and Appendix G is the Kalamazoo County Circuit Court Opinion in PEOPLE V RICHARD LOEHR d/ba DICK LOEHR'S AUTO SUPER MART File No. D 82300675 AV.

Moreover, Petitioner's Appendix G (the LOEHR Opinion) is mistakenly entitled "County of Saginaw", when it should be entitled "County of Kalamazoo."

Petitioner's Appendix G has no precedential effect in Michigan.

ARGUMENT

Petitioner's request for a Writ of Certiorari presents no substantial federal question. An appeal concerning a similar Illinois statute was dismissed by this Honorable Court for want of a substantial federal question in FIRESIDE CHRYSLER-PLYMOUTH, MAZDA INC. et al, v JIM EDGAR, SECRETARY OF STATE, et al ___Ill 2d ___; 464 NE2d 275 (1984) 469 US 926; 83 L Ed 2d 254; 105 S Ct 316 (1984). The same result should obtain in this case.

In FIRESIDE CHRYSLER-PLYMOUTH, MAZDA INC. et al v EDGAR, supra, the Supreme Court of Illinois upheld a statute similar to the one at issue here. Thus, it is clear that Petitioner misrepresents the law of Illinois at pages 24-27 of its Petition, where COURTESY MOTOR SALES et al v DANIEL P. WARD, STATES ATTORNEY et al 33

Ill App 2d 499; 179 NW2d 692 (1962) is discussed.

Defendant challenges the statute at issue as being a Sunday closing law. However, it is notable that said statute is embodied within Michigan's Motor Vehicle Code, thus indicating a purpose beyond that of a mere Sunday closing law. See generally Petitioner's Appendix B, pages B9 - B11.

Assuming arguendo that the legislation at issue is merely a Sunday closing law, it is notable that this Honorable Court has specifically upheld the validity of Sunday closing laws against a variety of constitutional challenges. See the unanimous opinion in McGOWAN V STATE OF MARYLAND, 366 US 460; 81 S Ct 1153; 6 L Ed 2d 393 (1961) (due process, equal protection, first

amendment/religion). TWO GUYS FROM HARRISON V McGINLEY, 366 US 582; 81 S Ct 1135; 6 L Ed 2d 551 (1961) (equal protection and due process -- stating, "...the legislature may select one phase of one field and apply a remedy there, neglecting the others." 366 US at 592). GALLAGHER V CROWN KOSHER SUPER MARKET, 366 US 617; 81 S Ct 1122; 6 L Ed 2d 536 (1961) (equal protection and first amendment/religion).

Likewise, at least one federal district court has upheld a state Sunday Closing Law. In HAMES MOBILE HOMES v SELLERS, 343 F Supp 12 (1972 N.D. Iowa), a federal district court upheld an Iowa Sunday closing law prohibiting the sale of motor vehicles. On federal grounds, it was specifically held that the statutory classification was not invidious and that

there was a rational basis. The reasons advanced in support of the rational basis finding included: hazards to the public due to the lack of mechanics on Sunday, the lack of law enforcement officers for checking dealers lots, the difficulty in obtaining necessary liability insurance and the difficulty in checking titles and liens on Sunday. It was further held that the mere fact a statutory classification works a hardship on a particular segment of the commercial world is not sufficient reason to strike it down on constitutional grounds. 343 F Supp. 12.

Many states in addition to Michigan and Illinois have upheld far, far broader closing statutes than the one now in question. Most of the relevant cases are collected in an in-depth annotation

concerning the validity of Sunday closing laws found at 10 ALR 4th 246. See, for example, DIAMOND AUTO SALES v ERBE 251 Iowa 1330; 105 NW2d 650 (1960).

In closing on the question of whether this case presents a substantial federal question, Respondent notes that, in the area of economic legislation such as this, it is extremely doubtful that even a demonstrated lack of efficacy would suffice to establish a violation of substantive due process. EXXON CORPORATION v MARYLAND, 437 US 117, 125; 98 S Ct 2207; 57 L Ed 2d 91 (1934).

From a procedural jurisdiction standpoint, Respondent argues that Petitioner's failure to timely file its Motion for Reconsideration rendered that pleading nugatory. The proof of service date attested to in Petitioner's Appendix

E is irrelevant because, under MCR 7.313(D)(1), it is the time of filing (not service) which is relevant. Moreover, the Affidavit of Timely Filing contained in Petitioner's Appendix E is simply inaccurate, in view of the fact that Michigan Supreme Court Records, of which this Honorable Court may take judicial notice pursuant to FRE 201(2), reflect a late filing date of November 14, 1982. Thus, Petitioner's time for taking action in this case should be computed from the Michigan Supreme Court's October 22, 1986 denial of leave. When Petitioner's time is so-computed, it is clear that Petitioner has failed to timely pursue a remedy in this Court. U.S. Sup. Ct. Rules 11 and 22; 28 U.S.C.A.

From a procedural/jurisdictional standpoint, Respondent argues that

Petitioner's questions 4 and 5 do not belong before this Honorable Court because they were not raised and addressed below. WEBB v WEBB, 451 US 493; 101 US 1889; 68 L Ed 2d 392 (1981).

From a procedural jurisdiction standpoint, Respondent finally argues that the Michigan Court of Appeals' decision was not grounded on the United States Constitution and therefore does not present a federal issue. WEBB v WEBB, supra.

CONCLUSION

WHEREFORE, Respondent prays that this Honorable Court deny this Petition for Writ of Certiorari.

Respectfully submitted,

CHRISTOPHER S. BOYD
PROSECUTING ATTORNEY

By: Annette M. Gray
ANNETTE M. GRAY (P-28088)
Assistant Prosecuting Attorney
Chief of Appeals

AFFIDAVIT OF SERVICE

STATE OF MICHIGAN)
)SS
COUNTY OF SAGINAW)

I, ANNETTE M. GRAY, hereby certify that on this 25th day of June, 1987, three copies of the Brief in Opposition to Petition for Writ of Certiorari were mailed postage prepaid to KAREN JEAN CHOATE, 3126 Davenport Street, Saginaw, Michigan 48602, and three copies were mailed to FRANK J. KELLEY, Attorney General, State of Michigan, Law Building, 525 West Ottawa, Lansing, Michigan 48913. I further certify that all parties required to be served have been served.

Annette M. Gray

ANNETTE M. GRAY
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Subscribed and sworn to before me
this 25th day of June. 1987.

Geraldine Heritier

GERALDINE HERITIER, Notary Public
Saginaw County, Michigan
Ny commission expires:
August 22, 1988.